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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARS ASPENLIND,

Plaintiffs,

CIV. NO. S-11-0366 MCE GGH

vs.

SPARTAN MORTGAGE SERVICES, et al.,

Defendants.

ORDER

Presently pending on this court’s law and motion calendar for September 15, 2011, is plaintiff’s motion for default judgment, filed August 3, 2011, against defendants Seville Equities (“Seville”), Sutherland and Gray. Defendants have not filed an opposition. Having reviewed the motion, the court determines that it is suitable for decision without oral argument. The September 15, 2011 hearing is therefore vacated.

Plaintiff seeks default judgment against the aforementioned defendants for their failure to answer the first amended complaint within the 21 day period after service which was effectuated on February 9, 2011 for defendant Gray, and February 10, 2011 for defendants Seville and Sutherland. Instead, these defendants filed a motion to dismiss on March 14, 2011, which was taken under submission without a hearing by the court on April 11, 2011, almost four months before plaintiff filed the motion for default judgment.

1 According to Ninth Circuit law, a motion to dismiss pursuant to Federal Rule of
2 Civil Procedure 12(b) may be made at any time before a responsive pleading is filed. Aetna Life
3 Insurance Co. v. Alla Medical Services, Inc., 855 F.2d 1470, 1474 (9th Cir. 1988). The motion
4 to dismiss in this case was filed before an answer, and therefore it is timely.

5 Furthermore, plaintiff did not file a request for entry of default prior to filing his
6 motion for default judgment, as required by Fed. R. Civ. P. 55(a). Therefore, plaintiff's motion
7 for default judgment is denied as premature. Finally, plaintiff did not move for default judgment
8 until over four months *after* defendants filed their motion to dismiss, and therefore no prejudice
9 has resulted from any possible delay in moving to dismiss.

10 Accordingly, IT IS ORDERED that:

11 1. The September 15, 2011 hearing on plaintiff's motion for default judgment is
12 vacated from the calendar; and

13 2. Plaintiff's motion for default judgment, filed August 3, 2011, (dkt. no. 18), is
14 denied.

15 DATED: September 8, 2011

16 /s/ Gregory G. Hollows
17 UNITED STATES MAGISTRATE JUDGE

18 GGH:076/Aspenlind0366.def.wpd
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